

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: . Chapter 11  
BUILDING MATERIALS HOLDING .  
CORPORATION, *et al.*, . Case No. 09-12074 (KJC)  
 . (Jointly Administered)  
 .  
 . October 22, 2009  
 . 2:00 p.m.  
Debtors. . (Wilmington)  
 .

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE KEVIN J. CAREY  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtors: Michael A. Rosenthal, Esq.  
Gibson, Dunn & Crutcher, LLP  
For the Committee: Christopher J. Giaimo, Esq.  
Arent Fox, LLP

VIA TELEPHONE:

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1 THE CLERK: All rise. Be seated, please.

2 THE COURT: Good afternoon, everyone.

3 MR. ROSENTHAL: Good afternoon, Your Honor. Michael  
4 Rosenthal with Jeremy Graves from Gibson, Dunn & Crutcher and  
5 Sean Beach and Robert Poppiti from Young Conaway on behalf of  
6 the Debtors, Building Materials Holding Corporation and its  
7 subsidiaries. And with us today is Paul Street, who's the  
8 general counsel of Building Materials Holding Corporation.  
9 Your Honor, I think I would rather have had a root canal than  
10 go through the last 72 hours, and I think that everybody  
11 that's at least in front of the bar would agree with me on  
12 that.

13 THE COURT: Yes. They would probably prefer you go  
14 through a root canal also.

15 MR. ROSENTHAL: I'm sure. We thought we were going  
16 to, unfortunately, have to come in here on a contested basis,  
17 having been unable to reach a resolution with the Committee.  
18 I'm happy to report that shortly before walking over to the  
19 court, we did reach a resolution with the Committee. We have  
20 hurriedly revised the plan, the disclosure statement, and the  
21 glossary to the plan to reflect the resolution. I warn the  
22 Court we've handed up some black lines of those changes.  
23 They're minimal, but at the same time, we did it very, very  
24 hurriedly. So there may be some discrepancies that we'd like  
25 the ability to conform to the deal which I am going to report

1 to the Court. We tried, I tried to catch everything, but I'm  
2 sure I missed something. The basic changes, Your Honor,  
3 between the plan that was filed late, late last night without  
4 the deal and the plan that we are going forward on, the  
5 disclosure statement that we're going forward on today  
6 changes the treatment of the unsecured creditor class by  
7 increasing the unsecured creditor fund from \$2 million to  
8 \$5.5 million. I know the Court had not had a lot of time to  
9 review what we filed last night, but it - -

10 THE COURT: I saw that it had gone down to 2  
11 million. From 5 million.

12 MR. ROSENTHAL: Yes, Your Honor. That's part of the  
13 root canal problem. But what we have also done, what we also  
14 did in the plan last night, which we have continued in the  
15 plan today is we raised the unsecured creditor fund back to a  
16 \$5.5 million level, and we removed the death trap provisions  
17 that had been included in all of the unsecured claim class  
18 treatments. There is some other portions of this deal, if  
19 you will, that I would like to report to the Court, because I  
20 think they're important. As part of this arrangement the  
21 Committee will agree to support the plan and not take any  
22 action inconsistent with the plan. In view of that, we have,  
23 in three or four places in the disclosure statement put some  
24 very simple language about the Committee supporting the plan  
25 and urging creditors to vote for the plan. The expectation

1 based on the Committee's support for the plan, Your Honor, is  
2 that there will not be a significant amount of work that  
3 continues to be done by Committee counsel or their financial  
4 advisors. Of course, we assume they're going to follow the  
5 case to make sure that the consideration that's been promised  
6 stays the same and doesn't shift from day to day. Which goes  
7 in with, really, with the final part of this arrangement.  
8 And that is that I think the Debtors, the Committee, and the  
9 lenders are going to be submitting to the Court a stipulation  
10 to the following general affect. The Committee is reserving  
11 the right, and the lenders are agreeing to allow the  
12 Committee to reserve the right to challenge the banks' liens  
13 or bring actions against the banks. As you recall, these  
14 were reserved in connection with the cash collateral order.  
15 However, the Committee will agree that so long as the plan  
16 treatment to unsecured creditors does not change, they will  
17 not bring any such action. And then I, we haven't, I think  
18 it's probably the effective date, when the plan goes  
19 effective the Committee will release any rights they have,  
20 waive any rights they have to bring any such challenge claim  
21 forever. And the theory here is that in the event the plan  
22 changes, the Committee can go back and resurrect any, bring  
23 any potential claims they have against the banks.

24 THE COURT: The Sword of Damocles will dangle until  
25 the effective date.

1           MR. ROSENTHAL: Correct. Now Your Honor, we, we are  
2 here today on the disclosure statement hearing. We can  
3 proceed with the disclosure statement hearing first, or we  
4 can proceed with the motion to approve the commitment fee  
5 with respect to the exit financing.

6           THE COURT: As you please, counsel.

7           MR. ROSENTHAL: All right. May I approach, Your  
8 Honor?

9           THE COURT: You may. Thank you.

10          MR. ROSENTHAL: The first matter, Your Honor, is the  
11 order to, the motion to approve the commitment letter, and  
12 the fee letter, and the payment of the commitment fee to the  
13 exit credit facilities lenders. There were no objections to  
14 this order. And we had originally submitted it under a  
15 certificate of no objection. We withdrew the certificate not  
16 because we received an objection, but because the Debtors and  
17 the exit lenders were discussing the precise financial  
18 covenants that would be attendant to the term sheet. We're  
19 still in discussions along those lines, Your Honor. But we  
20 have revised the order. If you look at page 2 of this  
21 proposed order, Your Honor, in paragraphs 3 and 4, we have  
22 revised the order to authorize the Debtors to pay the  
23 commitment fee provided that there is an agreement reached  
24 between the Debtors and the lenders on the financial  
25 covenants. So just a little background for the Court. There

1 are three requirements now for the Debtors to be able to make  
2 this payment. One is Bankruptcy Court approval sought by  
3 this order. The second is that as a condition to making the  
4 payment, the exit credit facilities lenders will have to  
5 approve the plan. We obviously don't want to make a  
6 significant commitment fee payment to the exit credit  
7 facilities lenders and have them tell us that they don't  
8 approve the plan. And the third, now, Your Honor, will be  
9 this agreement as to the financial covenants. And we're not  
10 very far off, but we have some issues about what the  
11 covenants will be mid 2010. So we would ask the Court to  
12 approve the order with respect to the commitment letter, the  
13 fee letter, and the commitment fee.

14 THE COURT: I've reviewed the fee structure. It's  
15 not cheap financing, but I don't run any, I run across any  
16 cheap financing these days. Let me ask this, the papers did  
17 not indicate the magnitude of what the expense reimbursement  
18 would be. Any handle on that at this point?

19 MR. ROSENTHAL: I don't, Your Honor. I'm looking to  
20 Mr. - -

21 THE COURT: And he's looking back, I see.

22 MR. ROSENTHAL: He's looking at me. I don't, Your  
23 Honor. But we're not contemplating that it be significant.  
24 This is, as the Court observed, it's, it is expensive  
25 financing. There is no inexpensive financing these days.

1 It's the only financing that we could find in a number of  
2 months of searching that would enable the company to have the  
3 funds that it needs on a timely basis.

4 THE COURT: Let me ask, does anyone else care to be  
5 heard in connection with this motion? I hear no response.  
6 Well, in the absence of objection I am inclined to approve  
7 the request. Do you have a form of order for me?

8 MR. ROSENTHAL: I will. May I approach?

9 THE COURT: Yes. That order has been signed. I'll  
10 make one other comment. I do appreciate the fact that there  
11 was no request to keep any of that information under seal.

12 MR. ROSENTHAL: Your Honor, the next matter - -  
13 thank you very much for that. We hope the credit markets  
14 improve. I think everybody hopes they improve pretty  
15 quickly. The next matter, Your Honor, is the hearing on  
16 approval of the disclosure statement. Let me start by  
17 walking the Court through the changes that we are filing in  
18 the version before the Court today. I think the Court has a  
19 copy.

20 THE COURT: I do.

21 MR. ROSENTHAL: Turn to romanette i, just the back  
22 of the first page. We've added, it's basically the same  
23 language that had been in the disclosure statement before,  
24 however we've added the reference to the Committee supporting  
25 the plan and urging creditors to vote. The next change, Your

1 Honor, is on page 1, after the index. And this is a change,  
2 Your Honor, that I've handwritten, because my computer skills  
3 are not very good, and I obviously didn't pick up everything  
4 I should have. But this reflects that the \$2 million is  
5 increased from, to 5.5 in two areas where I did not pick it  
6 up. Page 2, on the next page, we've revised the numbers, the  
7 net debt numbers, to reflect that there will now be \$3½  
8 million more in payments going out the door on the effective  
9 date to the unsecured creditors, so that changes the net debt  
10 numbers. Page 5, Your Honor, there's been a, we revised the  
11 sources and uses chart, again to reflect the increase in the  
12 payment from 2 million to 5.5. Same thing on page 6. The  
13 change there is just a conforming change. Pages 8 and 11,  
14 12, 13, these are charts, with respect to the distribution,  
15 and they all have been changed to increase or change the  
16 projected recoveries to the senior, the secured lenders and  
17 to the unsecured creditor class by virtue of the increase in  
18 the payment to the unsecured creditors. So the unsecured  
19 creditor distribution is increased from 4.4% to 12.1%. And  
20 there's been a slight reduction in the secured creditor  
21 distribution. Just to make sure that we were doubly complete  
22 here, Your Honor, we, there's another chart starting on pages  
23 - - actually that's not right. Go to page 27. Again, in, on  
24 27 we've added the reference to the Committee supporting the  
25 plan. And the other chart, Your Honor, starts on page 46.



1 So in 46 and the pages following, we've just made the same  
2 adjustments to reflect the change in the percentage  
3 recoveries. Page 65, I did pick up this change from the 2  
4 million to the 5.5 million, and that's reflected there. Page  
5 89, again, we've revised the net debt numbers along the same  
6 lines as I discussed before. And then finally, Your Honor,  
7 at the end of the disclosure statement, in the conclusion and  
8 recommendation, we added the reference to the Official  
9 Committee of Unsecured Creditors and the company believing  
10 the plan is in the best interest. Now those were the changes  
11 that we made relative to the agreement that was just reached.  
12 But I will tell the Court that we had had both a formal  
13 objection filed by the Committee some number of months ago to  
14 some of the disclosures in the disclosure statement. And  
15 then, since the last hearing, we received an email from the  
16 Committee with some informal comments about the disclosure  
17 statement. And we endeavored, to the best of our ability, to  
18 incorporate, you know, all of their comments. And I think  
19 we've successfully done so. There was not a second objection  
20 filed, but we, you know, if you would compare the version of  
21 the plan I think that was filed in, certainly with the  
22 filing, and the disclosure statement was filed June 16<sup>th</sup> to  
23 the disclosure statement today, there are a number of changes  
24 that incorporate, primarily, comments that we received from  
25 the Unsecured Creditors Committee. We also have received - -

1 do you have the other objections? We also received some  
2 other objections and some comments from the IRS, from  
3 Maricopa County, and we have incorporated all of those  
4 comments into the disclosure statement and into the plan.  
5 And they're not here. You know, they've signed off on those.  
6 There were several letters that were sent in objecting to,  
7 purporting to object to the disclosure statement. We listed  
8 them in the agenda that we had filed with the Court. We do  
9 not believe that these letters, these objections go to the  
10 adequacy of the disclosure statement, and we believe Your  
11 Honor, that to the extent that they deemed to be objections,  
12 they should be overruled.

13 THE COURT: I reviewed your, the Debtors' response,  
14 as it was contained in the chart, to these submissions.

15 MR. ROSENTHAL: Thank you, Your Honor. So based on  
16 that, Your Honor, we believe that the disclosure statement  
17 does presently contain adequate information, information  
18 adequate to enable a, an investor to make a reasoned judgment  
19 about whether to accept or reject the plan. And we would  
20 hope that the Court would approve the disclosure statement.  
21 We have some recommendations about dates, subject to the  
22 Court's schedule that we would hope would be incorporated in  
23 the order.

24 THE COURT: All right. Thank you. Let me ask if  
25 anyone else wishes to be heard in connection with disclosure.

1           MR. GIAIMO: With respect to the disclosure  
2 statement, Your Honor, we believe, although we got at 1  
3 o'clock in the morning, in sitting here and reviewing it as  
4 counsel was going through it, it does appear that they've  
5 addressed, from a disclosure statement standpoint, all of our  
6 issues that we raised with them.

7           THE COURT: All right. Thank you. Does anyone else  
8 wish to be heard?

9           MS. ROMERO (Telephonic): Yes, Your Honor. This is  
10 Martha Romero and I'm appearing for the County of San  
11 Bernardino, California Taxing Authority. And I just want to  
12 represent that even though we got some documents, the latest  
13 black line, late, that Debtors' counsel is very concerned  
14 about our objections, or what we would have put forth as  
15 objections. And we have worked out all of the language with  
16 regards to the secured claims and tax claims, and I am  
17 satisfied with the language. Although I haven't had  
18 confirmation that that language was in fact going to put in  
19 the, going to be put in the disclosure statement. And I  
20 haven't had a chance to review the new black line that I  
21 received yesterday. So maybe I could get confirmation from  
22 someone that that language with regards to the secured tax  
23 claims have been put in §4, I believe it's, it might have  
24 been changed, but page 12 of the disclosure statement.

25           MR. ROSENTHAL: Yes, Your Honor. I would confirm

1 that. §4.4.2 of the plan and the related disclosure  
2 statement provisions have been revised to address the  
3 objection in the way that was agreed. I think the discussion  
4 was actually between Mr. York in my office and counsel. But  
5 we have made the changes that were requested.

6 THE COURT: All right. Thank you. Does anyone else  
7 wish to be heard in connection with disclosure? All right.  
8 I hear no further response. Well, based upon the revisions,  
9 the agreements that have been made, and at this point the  
10 absence of objection, and to the extent the letter  
11 submissions to which Debtors' counsel referred should be  
12 considered objections, I overrule them. They really go more  
13 to payment of their claims rather than the quality of the  
14 disclosure statement. I'm therefore, prepared to approve the  
15 proposed disclosure statement assuming it's gotten into final  
16 form, as it's been described to me here in court today. Let  
17 me ask what you propose in the way of timing.

18 MR. ROSENTHAL: Yes, Your Honor. May I approach,  
19 Your Honor?

20 THE COURT: Yes. Thank you.

21 MR. ROSENTHAL: Your Honor, I've tendered a copy of  
22 the proposed disclosure statement and solicitation procedures  
23 approval order. We took the, frankly we took the liberty of  
24 calling your chambers to find out what your calendar was  
25 like. And we were told that you had December 10<sup>th</sup> available

1 for a confirmation hearing. Based on that, we worked, in  
2 effect, we worked backwards with some of the dates. So if  
3 that is an acceptable date, what we were thinking, Your  
4 Honor, let me tell you the dates we were thinking about,  
5 which have, which are in the order that's before you. A  
6 record date of today. October 27<sup>th</sup> for distribution of  
7 solicitation materials. November 1<sup>st</sup> for notices of  
8 publication of the confirmation hearing. November 16<sup>th</sup> for a  
9 vote objection deadline. A voting deadline of November 25<sup>th</sup>.  
10 And let me stop there. November 25<sup>th</sup> is the day before  
11 Thanksgiving. But it is about 30 days after the packets will  
12 have been mailed. The packets will have been mailed no later  
13 than the 27<sup>th</sup>. So 31 days in October, so November 25<sup>th</sup> we  
14 believe would give sufficient notice. The confirmation  
15 objection deadline, we propose to set as the same date,  
16 November 25<sup>th</sup>. And then on December 1<sup>st</sup>, we have a deadline  
17 for creditors to bring a Rule 3018 claims estimation motion,  
18 and in effect the mirror image of that for the Debtors to  
19 bring an estimation motion related to votes that were cast  
20 that we question. And then that all leads, Your Honor, into  
21 two further dates. Reply dates for the confirmation  
22 objections and for the estimation motions on December 7<sup>th</sup>.  
23 And a confirmation hearing on December 10<sup>th</sup>.

24 THE COURT: All right. I took my laptop off the  
25 bench when I went to NCBJ, and I forgot to bring it back

1 today. So let me turn to my courtroom deputy and ask her how  
2 that fits.

3 UNIDENTIFIED SPEAKER: (Microphone not recording.)

4 THE COURT: Okay. And - -

5 UNIDENTIFIED SPEAKER: (Microphone not recording.)

6 THE COURT: All right. Then, what does my Lotus  
7 Notes have for that day, if anything?

8 UNIDENTIFIED SPEAKER: (Microphone not recording.)

9 THE COURT: Okay. 11 o'clock on the 10<sup>th</sup> is fine.

10 MR. ROSENTHAL: Um-hum. 11 o'clock? Okay. We'll  
11 write that into the order, Your Honor. We, a couple other  
12 dates in here. You know, we have dates for the plan, what  
13 the, the plan incorporates some dates, and we have dates for  
14 serving cure notices which are 20 days in advance of the  
15 confirmation hearing. I think it's pretty typical,  
16 consistent with what we've seen in other orders from the  
17 Court. We have a plan supplement date, pretty typical date,  
18 which is 10 days before the voting deadline for filing plan  
19 related final documents. Your Honor, if you look at the  
20 order approving the disclosure statement, we have, we have  
21 made these adjustments. As you look through the black line,  
22 we've inserted these dates in the document. And then you see  
23 conforming changes in the remainder, in the exhibits to the  
24 order. There are - - and in the, and obviously in the  
25 ballots as well. And as I'm looking through the ballots I

1 can even see that we have a reference to, you know, the plan  
2 dated October 1<sup>st</sup>. So there is a provision in the order, Your  
3 Honor, which, which enables us to make conforming changes to  
4 these ballots. And we've made a few changes that were  
5 suggested by Garden City on the ballots, to make the  
6 balloting process work more smoothly. We're hopeful Your  
7 Honor, that the Court would enter this order.

8 THE COURT: All right. Let me ask does anyone have  
9 any comment with respect to the proposed scheduling? I hear  
10 no response. All right. Do you have a form of order for me?

11 MR. ROSENTHAL: Your Honor, I'm told we need a few  
12 minutes to fill in all the dates, if that would be okay.

13 THE COURT: Okay.

14 MR. ROSENTHAL: We have a small confirmation order.  
15 May I approach?

16 THE COURT: You may.

17 MR. ROSENTHAL: Disclosure statement order.

18 THE COURT: Thank you. The order has been signed.

19 MR. ROSENTHAL: Thank you very much, Your Honor.

20 THE COURT: Is there anything further for today?

21 MR. ROSENTHAL: Nothing further. I don't - -

22 MR. GIAIMO: Just briefly, Your Honor. I want to  
23 follow up on some comments that counsel made. He mentioned  
24 that it was a lot like root canal. I kind of have a  
25 different analogy. It was like being Bernie Madoff. First

1 they take away all the money, then the more you complain  
2 about it, the more difficult they seem to make it. But I did  
3 want to thank the Court for allowing us the time to conduct  
4 some discovery before today's hearing, and I want to thank  
5 the Debtors' counsel and their professionals who made  
6 themselves available, provided a lot of documents, had us up  
7 to New York, and really kind of clarified a lot of things for  
8 us. At the end of the day it seemed like things were  
9 continuing to move south for the Committee. And so the  
10 settlement that we entered into, while heartbreaking for the  
11 Committee, is probably the right thing to do. The  
12 stipulation that counsel mentioned is going to be critical  
13 for us, just because of our experience in the last three or  
14 four months seeing every time we came back to the table,  
15 something had seemed to move to our disadvantage. So as you  
16 put it, the Sword of Damocles is important. I'm not exactly  
17 sure who's head it's actually hanging over. I think it's  
18 probably ours. But I think it's going to be very important  
19 for us. So we'll get right to negotiating that with the  
20 lenders and hopefully submit that under certification of  
21 counsel soon, and move on, and kind of keep our fingers  
22 crossed. But it's been an extremely difficult and, you know,  
23 mildly disappointing road. But you know, I think at the end  
24 of the day you have to do what's in the best interest of your  
25 clients, and I think we've done that. So we, you know,



1 hopefully, we'll see a successful reorganization and the  
2 company strive. And I think that's all we have.

3 THE COURT: All right. Thank you.

4 MR. GIAIMO: Thank you, Your Honor.

5 THE COURT: Anything further? All right. Thank you  
6 all. That concludes this hearing. Court will stand in  
7 recess.

8 (Whereupon at 2:44 p.m. the hearing in this matter was  
9 concluded for this date.)

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18 I, Jennifer Ryan Enslin, approved transcriber for  
19 the United States Courts, certify that the foregoing is a  
20 correct transcript from the electronic sound recording of the  
21 proceedings in the above entitled matter.

22

23 /s/Jennifer Ryan Enslin  
24 Jennifer Ryan Enslin  
25 43 Bay Boulevard  
Newark, DE 19702  
(302) 836-1905

October 27, 2009

**UNITED STATES BANKRUPTCY COURT**  
**District of Delaware**

**In Re:**

Building Materials Holding Corporation  
720 Park Boulevard, Suite 200  
Boise, ID 83712  
EIN: 91-1834269

**Chapter:** 11

*Case No.:* 09-12074-KJC

***NOTICE OF FILING OF TRANSCRIPT AND OF DEADLINES RELATED TO RESTRICTION AND REDACTION***


A transcript of the proceeding held on 10/22/2009 was filed on 10/28/2009 . The following deadlines apply:

The parties have 7 days to file with the court a *Notice of Intent to Request Redaction* of this transcript. The deadline for filing a *request for redaction* is 11/18/2009 .

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Clerk of Court

Date: 10/28/09

(ntc)

## Notice Recipients

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Case: 09-12074-KJC

User: Brandon  
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Date Created: 10/28/2009  
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### Recipients of Notice of Electronic Filing:

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TOTAL: 3

### Recipients submitted to the BNC (Bankruptcy Noticing Center):

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TOTAL: 5